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Attorneys for Plaintiffs/Counter-Defendants, LARGO CONCRETE,  
 INC. and N.M.N. CONSTRUCTION, INC.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

LARGO CONCRETE, INC., a California  
 Corporation; N.M.N. CONSTRUCTION,  
 INC., a California Corporation.

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE  
 COMPANY, a Massachusetts Corporation,  
 and DOES 1 through 100, inclusive.

Defendants.

AND RELATED COUNTERCLAIM

Case No. C07-04651 CRB (ADR)  
*The Hon. Charles R. Breyer*

**REPLY TO OPPOSITION TO PLAINTIFFS'  
 EX PARTE APPLICATION FOR:**

- 1) STAY OF ALL PROCEEDINGS PENDING  
 DISPOSITION OF LARGO'S PETITION  
 FOR WRIT OF MANDAMUS; and**
- 2) RULINGS ON LARGO'S OBJECTIONS  
 TO EVIDENCE PRESENTED BY LMF IN  
 SUPPORT OF ITS MOTION TO  
 DISQUALIFY ROXBOROUGH,  
 POMERANCE & NYE**

Complaint filed: September 10, 2007

Plaintiffs/Counter-Defendants, LARGO CONCRETE, INC. and N.M.N. CONSTRUCTION,  
 INC. (hereinafter "Largo"), submit the following Reply to LIBERTY MUTUAL FIRE INSURANCE  
 COMPANY's (hereinafter "LMF") Opposition to Largo's *Ex Parte* Application.

**A. FEDERAL RULE OF APPELLATE PROCEDURE 8(a)(1)(A) DIRECTS A  
 MOTION FOR STAY TO BE MADE TO THE DISTRICT COURT PRIOR TO  
 APPLYING TO THE COURT OF APPEAL FOR SUCH RELIEF**

Federal Rule of Appellate Procedure 8(a)(1)(A) requires that prior to making a motion for stay  
 or injunction pending appeal to the court of appeal, the moving party must show that an application  
 for such relief was made to the district court and such application was denied, or that such application

1 to the district court was not practicable. A stay of proceedings in this matter is necessary to allow  
 2 Largo to seek review of the Court's order granting LMF's motion to disqualify RPN. Pursuant to  
 3 Federal Rule of Appellate Procedure 8(a)(1)(A), Largo is requesting such a stay from this Court. If  
 4 this Court is not inclined to grant a stay, Largo will seek a stay from the court of appeal.

5 **B. LMF WILL SUFFER NO PREJUDICE IF A STAY IS GRANTED**

6 LMF makes no mention of any prejudice or hardship it would suffer if a stay is granted to  
 7 allow Largo to pursue its rights with the court of appeal. In making a determination under the  
 8 *Bauman* factors, the relative hardships to the parties is the critical component: "If the balance of harm  
 9 tips decidedly towards the plaintiff, then the plaintiff need not show as robust a likelihood of success  
 10 on the merits as when the balance tips less decidedly." *Benda v. Grand Lodge of Intern. Ass'n of*  
 11 *Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9<sup>th</sup> Cir. 1978).

12 There is no trial date set for this matter. LMF has presented no evidence it will suffer any  
 13 prejudice or hardship if a stay is granted. This stay is necessary to allow Largo an opportunity to seek  
 14 review of this Court's Order prior to being forced to prosecute this action with inferior counsel against  
 15 LMF, who has retained counsel with substantial experience in this specialized area of law. The fact  
 16 that LMF will suffer little or no hardship compared to the level of hardship that will be suffered by  
 17 Largo if this stay is not granted heavily tilts the balance of hardships in favor of Largo.

18 **C. EX PARTE RELIEF IS APPROPRIATE PURSUANT TO PARAGRAPH 4 OF**  
 19 **THE HONORABLE JUDGE BREYER'S STANDING ORDER**

20 Largo's *Ex Parte* Application was brought pursuant to Paragraph 4 of the Honorable Judge  
 21 Breyer's Standing Order which states that "Parties seeking to continue hearings, request special status  
 22 conferences, modify briefing schedules, or make other procedural changes shall submit a signed  
 23 stipulation and proposed order, or, if stipulation is not possible, an *ex parte* application in writing".  
 24 Largo's *Ex Parte* Application seeks a procedural change – a stay of all proceedings. Based on LMF's  
 25 Opposition to the relief sought, it is apparent a stipulation was not possible. As such, after careful  
 26 review of the Court's Order granting LMF's motion to disqualify RPN, researching the available  
 27 avenues for review of the Order, and discussion of the same with Largo, counsel for Largo made this  
 28 *Ex Parte* Application. An immediate decision is required, and the normal notice provisions are

impractical because 1) the parties are under an obligation to conduct initial meetings and disclosures under FRCP 26 and, based on the Court's Order, such actions cannot be taken by Largo's current counsel, RPN, at this time, and 2) Largo desires an immediate ruling on its application for a stay so that it can proceed to seek review of this Court's Order by way of a petition for writ of mandamus with the Ninth Circuit.

**D. LARGO IS LIKELY TO PREVAIL ON THE MERITS OF ITS PETITION FOR WRIT OF MANDAMUS**

In order to show that Largo is entitled to a stay of proceedings pending appellate review of this Court's Order, Largo is not required to show that it absolutely will prevail on the merits of its Petition for Writ of Mandamus. A Party seeking a stay or injunction pending appeal need only show that it may prevail on the merits. *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9<sup>th</sup> Cir. 1991). As discussed in its moving papers, it is likely Largo may prevail on the merits of its Petition for Writ of Mandamus.

Largo respectfully believes that the Court erred by failing to apply the modified substantial relationship test to determine whether or not a conflict of interest exists that would subject RPN to disqualification because 1) there is no proof, admissible or otherwise, even accepting the evidence submitted by LMF as true, that Craig Pynes actually obtained any information confidential to Liberty which was material to WCBF litigation; and, 2) his prior attorney-client relationship with any Liberty entity was peripheral and attenuated from the unique area of WCBF litigation, specifically recognized by this Court. In addition, as this Court acknowledged in *Hitachi*, there is a shift taking place in California towards acknowledging the implementation of ethical walls. *Hitachi, Ltd. v. Tatung Co.* (N.D.Cal. 2006) 419 F.Supp.2d 1158, 1164.

**E. THE COURT SHOULD RULE ON LARGO'S OBJECTIONS SO THAT A CLEAR RECORD CAN BE SUBMITTED TO COURT OF APPEAL**

The herein Writ may result in a new appellate opinion regarding ethical walls.

Largo respectfully requests that the court rule on the objections submitted as to the evidence presented by LMF in support of its motion to disqualify RPN so that there is a clear record on appeal.

It is in the best interest of all parties concerned to have a clear record presented to the Ninth Circuit in association with Largo's Petition for Writ of Mandamus.

1           **F. CONCLUSION**

2           LMF will suffer little or no hardship, the level of hardship that will be suffered by Largo if this  
3 stay is not granted is high, and Largo is likely to succeed on the merits of its Petition for Writ of  
4 Mandamus. As such, based on the foregoing, Largo respectfully requests this Court issue an order  
5 staying this action in its entirety, pending disposition of Largo's Petition for Writ of Mandamus. In  
6 addition, because of an appeal, Largo would appreciate this Court rendering rulings on Largo's  
7 evidentiary objections to evidence submitted by LMF in support of its motion to disqualify.

8 DATED: January 31, 2008

ROXBOROUGH, POMERANCE & NYE LLP

9  
10 By: 

NICHOLAS P. ROXBOROUGH, ESQ.

MICHAEL L. PHILLIPS, ESQ.

Attorneys for Plaintiffs/Counter-Defendants,  
LARGO CONCRETE, INC. and N.M.N.  
CONSTRUCTION, Inc.



**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) ss

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 5820 Canoga Avenue, Suite 250, Woodland Hills, California 91367.

On **January 31, 2008**, I served the foregoing documents described as:

**REPLY TO OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR:  
1) STAY OF ALL PROCEEDINGS PENDING DISPOSITION OF LARGO'S  
PETITION FOR WRIT OF MANDAMUS; and 2) RULINGS ON LARGO'S  
OBJECTIONS TO EVIDENCE PRESENTED BY LMF IN SUPPORT OF ITS  
MOTION TO DISQUALIFY ROXBOROUGH, POMERANCE & NYE**

on the interested party(ies) in this action listed below:

Frank Falzetta, Esq.  
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**ATTORNEYS FOR DEFENDANT**  
**LIBERTY MUTUAL FIRE INSURANCE  
COMPANY**

- ☒ **BY ELECTRONIC MAIL:** I caused such documents listed above to be transmitted via e-mail to each of the parties on the attached service list at the e-mail address as last given by that person on any document which he or she has filed in this action and served upon this office.
- ☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the offices of the each addressee(s).
- ☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **January 31, 2008**, at Woodland Hills, California.

Kim Schwarz

